Red Rock Construction Sdn Bhd v People Realty Sdn Bhd

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–189 OF 2003(2)
KAMALANATHAN RATNAM J
18 AUGUST 2003

Arbitration — Award — Enforcement — Application for leave to enforce the arbitration award — Arbitration Act 1952 s 27

Arbitration — Award — Validity — Whether parties' chosen form of dispute resolution was to be considered as 'expert determination/valuation' or 'arbitration'

The defendant employed the plaintiff contractor to carry out construction works in a development project. A dispute arose between them regarding the value of work done. Both parties agreed to request the arbitrator to do a joint valuation with them of the work done. They also mutually agreed to abide by and accept the arbitrator's valuation without dispute. The arbitrator produced a joint valuation on 13 September 1999. The plaintiff applied to the High Court for leave to enforce the award. The issue that arose in this application was whether the joint valuation on 13 September 1999 was an arbitration award.

Held, allowing the application:

(1) Having considered the facts and evidence produced in court, the learned judge was satisfied that the arbitrator in this case was appointed to determine a certain matter, namely the value of the constructed works. He was called upon to exercise a judicial function after both parties had been given the opportunity to present evidence and finally, both parties had agreed to accept the decision (see para 9).

(2) The indicia (of the existence of arbitration) were as follows: (a) there is a dispute or a difference between the parties; (b) the dispute or difference has been remitted by the parties to a person to resolve in such a manner that he was called on to exercise a judicial function; (c) the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision (see para 12).

[**Bahasa Malaysia summary**

Defendan telah mengambil plaintif kontractor untuk bekerja bagi menjalankan kerja-kerja pembinaan dalam satu projek pembangunan. Pertikaian telah timbul antara mereka berhubung nilai kerja yang dilaksanakan. Kedua-dua pihak telah bersetuju untuk memohon timbangtara melakukan satu penilaian bersama dengan mereka terhadap kerja-kerja yang telah dibuat. Mereka juga bersetuju untuk mematuhi dan menerima penilaian timbangtara tanpa sebarang pertikaian. Penimbangtara telah mengemukakan satu penilaian bersama pada 13 September 1999. Plaintif telah memohon ke Mahkamah Tinggi memohon kebenaran untuk menguatkuasakan award tersebut. Persoalan yang timbul dalam permohonan ini adalah sama ada penilaian bersama pada 13 September 1999 adalah satu award penimbangtara.

Diputuskan, membenarkan permohonan tersebut:

(1) Setelah menimbangkan fakta-fakta dan keterangan yang dikemukakan dalam mahkamah, hakim yang bijaksana berpuas hati bahawa penimbangtara dalam kes ini telah dilantik untuk menentukan perkara tertentu, iaitu nilai kerja-kerja binaan. Beliau telah dipanggil untuk menggunakan fungsi kehakiman setelah kedua-dua pihak diberi peluang untuk mengemukakan keterangan dan akhirnya, setelah kedua-dua pihak telah bersetuju untuk menerima keputusan tersebut (lihat perenggan 9).

(2) Indicia (tentang kewujudan penimbangtara) adalah seperti berikut: (a) terdapat pertikaian atau perbezaan antara pihak-pihak; (b) pertikaian atau perbezaan tersebut telah diremitkan oleh pihak-pihak kepada seseorang untuk menyelesaikan dengan cara tertentu yang beliau dipanggil untuk menggunakan fungsi kehakimannya; (c) pihak-pihak telahpun diberikan peluang untuk mengemukakan keterangan dan/atau hujah-hujah menyokong tuntutan masing-masing dalam pertikaian; dan (d) pihak-pihak bersetuju untuk menerima keputusan beliau (lihat perenggan 12).]

Notes

For cases on the enforcement of arbitration awards, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1163–1173.

For cases on the validity of arbitration awards, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1248–1249.

Cases referred to

Arenson v Casson Beckman Rutley & Co [1975] 3 All ER 901 (refd)
Carus-Wilson and Greene, Re [1886] 18 QBD 7 (refd)
Chow Yoke Pui v Tan Tuan Boon & Ors [1971] 1 MLJ 190 (refd)

Legislation referred to

Arbitration Act 1952 s 27

Ooi Soo Jit (Wong-Chooi & Mohd Nor) for the plaintiff.
A Kanesalingam (Kanesalingam & Co) for the defendant.

THE APPLICATION

[1] By this application, the plaintiff has applied for leave under s 27 of the Arbitration Act 1952 to enforce the award of one Ian KE Ong (the arbitrator) given on 13 September 1999.

FACTS

[2] By way of Originating Motion 25–66–99, the defendant herein applied to set aside the award made by the arbitrator. I heard the motion and by a written judgment, dismissed the defendant's application with costs.

[3] Briefly, the facts are that the defendant who is a land owner/developer employed the plaintiff contractor to carry out construction works in a development project. The arbitrator was at all material times the quantity

surveyor of the said project. A dispute arose between the defendant and the plaintiff. The defendant alleged that the plaintiff, in collusion with the supervising architect issued false valuation certificates to claim a total sum of RM3,658,894 for work done. The defendant then employed the arbitrator to carry out a valuation of the actual work done by the plaintiff herein. The arbitrator's report assessed the work done as amounting to RM2,542,041.04. The plaintiff herein disputed this valuation. It was then agreed between the plaintiff and the defendant that they would request the arbitrator to do a joint valuation with them, of the work done. It was also mutually agreed between the plaintiff and the defendant that they would abide by and accept the arbitrator's valuation without dispute so that the parties could reach a final settlement. As a result, the arbitrator produced a joint valuation dated 13 September 1999 amounting to RM3,065,478.19. The defendant herein applied by the said originating motion to set aside the arbitrator's valuation dated 13 September 1999 or a part thereof.

[4] I dismissed the defendant's motion, inter alia, on the basis that since the defendant had alleged that its own architect had ill-advised its managing director to sign improper variation orders, it was only proper to have made its own architect a co-defendant and that having failed to give its own architect a chance to defend his integrity, the defendant cannot accuse wrongly its own architect. In any case, counsel having the conduct of the motion then before me, conceded that the defendant was not 'asking this court to find anything against the architects … .'

FINDINGS OF THE COURT

Whether the decision is an arbitration award

[5] In determining this issue, it is necessary to reproduce the joint letter of both the plaintiff and defendant and the letter from the arbitrator.

People Realty Sdn Bhd (119350-x)

(INCORPORATED IN MALAYSIA)

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5 August 1999

QS Konsultant

11th Floor, Bangunan Mayban Trust

No. 3 Penang Street

10200 Penang

Attn: Mr Ian Ong

RE: APPOINTMENT OF INDEPENDENT QS JOINTLY BY PEOPLE REALTY & RED ROCK CONSTRUCTION SDN BHD FOR JOINT-VALUATION FOR THE PURPOSE OF SHOWING WORKS DONE BY THE MAIN CONTRACTOR, RED ROCK CONSTRUCTION SDN BHD AT LOT 752, 762, 820, 812 & 811, MUKIM 13, JUNJONG, SEBERANG PERAI TENGAH FOR: M/S PEOPLE REALTY SDN BHD

Regarding to the teleconversation with your goodself on 3 August 1999, we together with Red Rock Construction Sdn Bhd hereby agree and confirm to

jointly appoint your good office to carry out joint-valuation for the above purpose at the above-mentioned site.

Both Red Rock and our office will abide and accept your valuation sum without dispute for our eventual settlement of the outstanding contractual sum.

Hence you are requested to carry out the above works as soon as possible professionally and efficiently.

Thank you for your attention.

Sgd

People Realty Sdn Bhd

Cc: Red Rock Construction Sdn Bhd

QS KONSULTANT

QUANTITY SURVEYORS AND BUILDING ECONOMISTS

11th Floor, Bangunan Mayban Trust,

3, Penang Street, 10200 Penang, Malaysia.

Telephone: (6)04-2623185

Facsimile: (6)04-2627655 e-mail: qsiofltm.net.my

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9 August 1999

People Realty Sdn Bhd 10-B Jalan Ipoh Kechil 50350 Kuala Lumpur

Attention: Mr John Chia

Dear Sirs,

APPOINTMENT OF INDEPENDENT QS JOINTLY BY PEOPLE REALTY & RED ROCK CONSTRUCTION SDN BHD FOR JOINT-VALUATION FOR THE PURPOSE OF SHOWING WORKS DONE BY THE MAIN CONTRACTOR, RED ROCK CONSTRUCTION SDN BHD AT LOT 752, 762, 820, 812 & 811, MUKIM 13, JUNJONG, SEBERANG PERAI TENGAH FOR: M/S PEOPLE REALTY SDN BHD

Thank you for your letter of 5 August 1999 wishing to appoint us for joint valuation for the above.

We would be pleased to accept the appointment subject to the following terms and conditions:

1 Our fee is a lump sum of Ringgit Ten Thousand (RM10,000) only and we would require from your goodselves and from Red Rock Construction a cheque of RM5,000 each before we commence work.

2 Both yourselves and Red Rock would be given the opportunity and be required to submit all contract documents and correspondence to us for verification so that we can carry out the valuation properly.

3 The valuation would be carried out as if the contract has been terminated on 'mutual agreement'. If there is any claim for loss of profit by any one of you against the other, this will not be taken into account here.

4 As stated in your letter both yourselves and Red Rock will agree to accept our valuation without dispute. Furthermore, you and Red Rock have agreed not to take any legal proceeding against me in the course of my discharging my duty from this appointment.

5 This appointment is over and above our appointment previously by People Realty Sdn Bhd as their quantity surveyor vide our letter of 26 April 1999 and will not prejudice the said previous appointment.

If the above terms and conditions are acceptable to you and Red Rock, kindly inform us so that we can arrange for a copy of this letter to be signed by both of you and return to us.

Thank you.

Yours faithfully,

QS KONSULTANT

(Sgd.)

Ian KE Ong

cc: Red Rock Construction

We accept the terms and conditions and hereby jointly appoint you to carry out the valuation.

PEOPLE REALTY SDN BHD	RED ROCK CONSTRUCTION SDN BHD
(119350-X)	(341648-U)
(Sgd 10/8/99)	(Sgd 11/8/99)
.....	.....
Director	
Sign & Chop	Sign & Chop
People Realty Sdn Bhd	Red Rock Construction Sdn Bhd

[6] The question that arises here is whether the parties' chosen form of dispute resolution is to be considered as 'expert determination' or 'arbitration'. *Russell on Arbitration* (21st Ed) states at p 37 that 'this is a matter of construction of the contract, which involves an objective enquiry into the intentions of the parties'. Whilst I agree that the word 'arbitration' or 'award' is not used in the terms of reference, it is clear to my mind that the parties herein had taken a defined position which was as stated in the caption of the two letters reproduced. Further, an arbitrator arrives at his decision on the evidence led and submissions made by the parties. An expert on the other hand, unless prohibited from doing so, makes his own enquiries, applies his own expertise, and arrives at a decision based on his own expert opinion.

[7] In *Chow Yoke Pui v Tan Tuan Boon & Ors* [1971] 1 MLJ 190, Sharma J said as follows at p 194:

> Arbitration differs from valuation inasmuch as, in valuation, there is generally no difference or dispute between the parties. In the case of valuation the parties intend that the valuer shall, without taking evidence or hearing arguments, make his valuation, according to his own skill, knowledge or experience.

[8] In *Re Carus-Wilson and Greene* [1886] 18 QBD 7, Lord Esher MR said as follows:

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon evidence laid before him, then the case is one of an arbitration. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner. On the other hand, there are cases in which a person is appointed to ascertain some matter for the purpose of preventing differences from arising, not of settling them when they have arisen, and where the case is not one of arbitration but of a mere valuation.

[9] I am satisfied that the arbitrator in this case was appointed to determine a certain matter, namely the value of the constructed works. He was called upon to exercise a judicial function after both parties had been given the opportunity to present evidence and finally, both parties had agreed to accept the decision.

[10] Further, the arbitrator had indeed acted true to his appointment. He reviewed all evidence presented by the parties and conducted joint-site inspection with the representatives of both parties.

[11] In *Arenson v Casson Beckman Rutley & Co* [1975] 3 All ER 901, the House of Lords in dealing with a case of negligence held that a valuer could be engaged by both parties as an arbitrator if there is a dispute about the value of a certain property. The dispute would be submitted to him for decision and the parties would put their contentions before him. He would then have to judge between them and thus have the arbitrator's immunity.

[12] Having considered numerous authorities cited, I accept the summation of the law on this aspect by Lord Wheatley in *Arenson* when his Lordship said at p 915 as follows:

> The indicia are as follows: (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called on to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.

[13] I am satisfied that the decision given is an arbitration award and Itherefore granted the plaintiff leave to enforce the award under s 27 of the Arbitration Act 1952, with costs.

Plaintiff's application granted with costs.

Reported by Rinchen Tee